lies far afield from the situation confronted by the Third Circuit.

Moreover, as the dates of these cases (along with several others advanced by Petitioner) indicate, they were handed down before the two most recent pronouncements by this Court on the subject of § 636(b)(3). *See Gomez v. United States*, 490 U.S. 858 (1989); *Peretz v. United States*, 501 U.S. 923 (1991). To the extent that this authority fails to heed this Court's admonition that consent is the touchstone for designation under § 636(b)(3), it is of questionable value. But the stale decisions also reflect something else – Petitioner's inability to cite a single case to support a conflict less than a decade old indicates that there is no current confusion amongst the circuits on the applicability of § 636(b)(3).

Against this backdrop, Petitioner insists that the Third Circuit's decision stands in direct conflict with the Tenth Circuit. *See Clark v. Poulton*, 963 F.2d 1361 (10th Cir.), *cert. denied*, 506 U.S. 1014 (1992) (Pet. at 7-8). The fact that Petitioner's best evidence of a split is what the dissent and certiorari petition said in that case, rather than what the majority held, confirms that no conflict exists. (Pet. at 8).

In *Clark*, the Tenth Circuit considered whether it was proper to refer an evidentiary hearing in a prisoner civil rights matter to a magistrate. In concluding that it was, the court rested its decision on two important findings. First, the plaintiff "made no objection to the referral to the magistrate judge. Therefore, . . ., the issue was waived by Clark's failure to object below." *Id.* at 1366. Needless to say, this contrasts fundamentally with the situation before the Third Circuit.

Second, Mr. Clark's lawsuit challenged two incidents of excessive force – one while he was being booked and another during confinement. Section 636(b)(1)(B) specifically allows referrals to magistrates for "evidentiary hearings" for "prisoner petitions challenging conditions of confinement." The latter incident fell squarely within this provision. Concerning the former, the court turned to the additional

duties clause rather than resolving the "confinement" issue and held: "Because Clark's section 1983 action challenging his treatment while being booked and while in pretrial detention is 'comparable in importance' to a prisoner petition challenging conditions of confinement . . . we believe the referral to the magistrate judge under section 636(b)(3) was proper." *Id.* at 1366.

The hearing on CERCLA equitable allocation bears no resemblance to any authorized statutory referral. As the Third Circuit recognized, that is a critical component of a CERCLA trial. *See* 42 U.S.C. § 9613(f)(1). Other circuits readily appreciate CERCLA equitable allocation presents a task for the district court: "Allocation of liability under CERCLA. . . is an equitable determination, in which the district court must make its own factual findings and legal conclusions." *Gopher Oil Co. v. Union Oil Co.*, 955 F.2d 519, 526 (8th Cir. 1992). And the Sixth Circuit has emphasized, in the context of finding a probation revocation hearing not delegable under § 636(b)(3), that hearings that require "fact-finding and credibility assessment" are beyond the pale of "additional duties." *Banks v. United States*, 614 F.2d 95, 98 (6th Cir. 1980). The court explained: "The issues adjudicated at the hearing are not procedural or administrative and do not turn on pure matters of law. With two exceptions, Congress has been careful to retain fact-finding functions in district judges." *Id.*; *see also United States v. Gomez-Lepe*, 207 F.3d 623 (9th Cir. 2000) (when party has not consented, "where discretion is exercised, the scope of magistrate judge's authority is construed more narrowly" under § 636(b)(3)). The district court did not delegate a "*Daubert* hearing" to the magistrate, it referred "one of the ultimate issues to be tried," which happened to be "the only issue in the case unique to contribution claims." (Pet. App. 20a). The sheer magnitude of the proceeding – 12 days, 14 witnesses, and 1300 exhibits – confirms that it does not compare to any of the authorized nonconsensual references in § 636.

Not surprisingly, therefore, the Third Circuit had no occasion to consider *Clark* in the course of its decision. Of course, that might also be attributable to Petitioner's failure to cite this case in either its brief before the Third Circuit or its petition for rehearing en banc. In a case so ably and vigorously argued, the fact that *Clark* was not mentioned speaks volumes.

Petitioner also offers a fleeting argument that a split has emerged regarding the significance of *de novo* review. (Pet. at 10). Yet the cases it cites recognize that they turn on the question of whether the parties consented to the magistrate. *See, e.g., Hill v. Duriron Co.*, 656 F.2d 1208 (6th Cir. 1981); *Ford v. Estelle*, 740 F.2d 374, 380 (5th Cir. 1984) (vacating reference of trial to magistrate in the absence of consent) (Pet. at 10). In *Hill*, the Sixth Circuit did not rule, as Petitioner invited the Third Circuit to do, that *de novo* review excused an improper delegation. Rather, the court found that *consent* cured the otherwise inappropriate reference: "There has been a complete trial before the magistrate. . . . We conclude that these steps were taken with consent of the parties. . . ." *Hill*, 656 F.2d at 1214.[3] In light of the consent, which obviated the need for any further scrutiny on the underlying reference, the only remaining question was the appropriate standard of review. Petitioner's reliance on cases where the parties consented validates, rather than undermines, the Third Circuit's result.

In this case, the Third Circuit correctly realized that the magistrate assumed adjudicatory functions traditionally reserved to the prerogative of Article III judges – and, indeed, conducted a trial – over Mead's objection. None of

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[3] Petitioner also suggests that by describing the magistrate's actions as "resolving" certain matters, the Third Circuit created yet another circuit split. (Pet. at 10). Even assuming such characterizations would be capable of yielding a split, the Third Circuit did not rest its decision on that point. It simply held that the magistrate had no authority and thus the district court had nothing to review.

Petitioner's array of authority addresses anything similar, and certainly none of it presents a conflict.

II. No Conflict Exists with Prior Supreme Court Decisions

Petitioner's claim of a conflict with authority from this Court is disingenuous in light of its admission that "this Court has not ruled on the application of § 636(b)(3) in civil cases" and its assertion that the relevant Supreme Court cases are "fundamentally different" from the matter at bar. (Pet. at 11, 23). Nevertheless, Petitioner proceeds to argue that the Third Circuit ran afoul of *Gomez v. United States*, 490 U.S. 858 (1989) and *Peretz v. United States*, 501 U.S. 923 (1991).[4]

In *Gomez*, this Court, construing the additional duties clause, held that a district court could not refer *voir dire* in a criminal trial to a magistrate in the absence of consent. It began the decision by parsing the language of the statute. "Read literally and without reference to the context in which they appear," § 636(b)(3) "might encompass any assignment that is not explicitly prohibited by statute or the Constitution." *Gomez*, 490 U.S. at 863. Yet the Court could not endorse such an analysis, preferring to "deduce[]" the meaning "from the context of the overall statutory scheme." *Id.* at 864. It explained: "When a statute creates an office to which it assigns specific duties, those duties outline the attributes of the office. Any additional duties performed pursuant to a

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[4] Petitioner also references *United States v. Raddatz*, 447 U.S. 667 (1980). However, that case involved a designation under § 636(b)(1) rather than § 636(b)(3), and it concerned a suppression hearing, which is specifically covered by § 636(b)(1). Nor does *Matthews v. Weber*, 423 U.S. 261 (1976) assist Petitioner. That case, interpreting a prior version of the Federal Magistrates Act, considered magistrate review of the "closed administrative record" in Social Security cases. *Id.* at 270. The Court emphasized that "neither party may put any additional evidence" in such a proceeding and that the magistrate "may do no more than propose a recommendation." *Id.* at 270-71.

general authorization in the statute reasonably should bear some relation to the specified duties." *Id.*

Relying on that contextual approach, this Court found that the range of duties available for referral was limited and advisory in nature. *Gomez*, 490 U.S. at 864. The legislative history confirmed that "magistrates should handle subsidiary matters to enable district judges to concentrate on trying cases." *Id.* at 872. In surveying the history of the magistrate's role, the Court readily recognized that "[a] critical limitation on [a magistrate's] expanded jurisdiction is consent." *Gomez*, 490 U.S. at 870.

Peretz confirmed that limitation. It considered a question left open by *Gomez* – whether *voir dire* in a felony trial could be delegated to a magistrate when both sides consented. While this Court permitted that practice, it took pains to emphasize the consent limitation on its decision.

As this Court explained, "the defendant's consent significantly changes the constitutional analysis" and such "consent also eliminates our concern that a general authorization should not lightly be read to deprive a defendant of any important privilege." *Peretz*, 501 U.S. at 932. In other words, consent broadens the acceptable range of "additional duties": "Of course, we would still be reluctant, as we were in *Gomez*, to construe the additional duties clause to include responsibilities of far greater importance than the specified duties assigned to magistrates. But the litigant's consent makes the crucial difference on this score as well." *Id.* at 933.

Far from being "blinded" by *Peretz* and *Gomez*, (Pet. at 22), the Third Circuit appropriately summarized these cases as follows: "The parties' consent or lack thereof is a key factor in deciding whether a referral is authorized under the 'additional duties' clauses." (Pet. App. 30a). And it appreciated the point made in *Peretz*: "the scope of the clause varie[s] significantly according to whether the parties' consented to the reference." (*Id.*). In the absence of consent, the court applied the contextual analysis mandated in *Gomez*.

Equitable allocation in a CERCLA action is "central to" and "the very core" of the trial. (Pet. App. 31a). It thus did not fall within the "subsidiary" or "administrative" matters permitted by the additional duties clause. *See Gomez*, 490 U.S. at 864, 872; *see also United States v. Bryson*, 981 F.2d 720, 725 (4th Cir. 1992) ("The duties that a magistrate may perform over the parties' objection are generally subsidiary matters. . . . However, with the parties' consent, a district judge may delegate to a magistrate supervision of entire civil and misdemeanor trials."); *Gomez-Lepe*, 207 F.3d at 628-29 (evaluating whether matter delegated to magistrate was "subsidiary" or a "critical stage" of the proceeding).

III. This Case Presents a Poor Vehicle for Certiorari

Perhaps appreciating the absence of a circuit split or any conflict with this Court's precedent, Petitioner devotes the bulk of attention to its argument that the question presented poses an important question of federal law that warrants this Court's immediate attention. Yet even cursory scrutiny of the reasons advanced by Petitioner reveals this argument to be without merit.

1. First, this case does not present any constitutional questions. That may seem curious to a reader of the Petition, given the substantial emphasis that it places on arguing that there was not an Article III or due process violation, (Pet. at 22-26), and that this Court needs to explicate the constitutional limitations on the additional duties clause. (Pet. at 19-21). However, the Third Circuit decided this matter on *statutory* grounds and found that reference under the "additional duties" clause was not authorized by Congress. (Pet. App. 29-31a). The Third Circuit began its analysis by noting that "[t]he jurisdiction of magistrate judges is limited by statute" and framed its conclusion as follows: "We conclude that the referral was not proper under any provision of the Magistrates Act." (Pet. App. 17a). It is the first task of any court confronted with statutory and constitutional issues to resolve the matter on the former grounds if possible. That

is exactly what the Third Circuit did, and as a result, it never reached any of the constitutional questions averted to by Petitioner. *See also NLRB v. A-Plus Roofing, Inc.*, 39 F.3d 1410, 1415 (9th Cir. 1994) ("[F]ederal magistrates are creatures of statute, and so is their jurisdiction. . . . We need not and must not reach the constitutional question if we can first determine that the magistrate had no statutorily-created jurisdiction to handle the referral we gave it."); *Harris v. Folk Construction Co.*, 138 F.3d 365, 370 (8th Cir. 1998) ("Where no consent is given under § 636(c), a magistrate judge is confined to his or her limited authority under the remaining provisions of the Act."). Therefore, this case does not afford this Court an opportunity to clarify any "confusion over magistrates' constitutional" authority. (Pet. at 14).[5]

Petitioner's effort to distract the Court and instill this case with greater importance by raising constitutional arguments accordingly should be disregarded.

2. Aside from the constitutional detour, Petitioner insists that review is warranted because of the "chilling" effect that the Third Circuit decision will yield amidst the "confusion" in the lower courts. (Pet. at 13-18). As explained above, the confusion claim is manufactured. The "chilling" protestation fares no better.

To be sure, Petitioner cites a series of statistics to demonstrate that the workload of the federal judiciary (district courts and magistrates alike) has increased in recent years. (Pet. at 13-14). Respondent does not quibble with that narrow point. But given that premise, if there really were true confusion about the role magistrates should play, one would expect to see a number of recent cases on the subject.

The paucity of authority reveals that lower courts understand and have correctly construed the additional duties

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[5] Nor can this Court provide district courts "with a specific list of tasks that fall within the 'additional duties'" clause – that lies solely within Congress' prerogative. (Pet. at 14).

provision under § 636. Petitioner, however, isolates a snippet from the legislative history that this Court has previously referenced about district courts "experiment[ing]" with magistrate judges and asserts that all such experimentation will now surely grind to a halt. (Pet. at 15-18). Nothing of the sort will occur. It is important to set that reference in context. Congress did not mean to unleash district courts from the confines of the statute by including the "additional duties" clause. *See United States v. Colacurcio*, 84 F.3d 326, 333 (9th Cir. 1996) ("The 'additional duty' provision cannot be interpreted in such a way as to swallow up the whole statute."); *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1369 (7th Cir. 1990) ("Nor would there be much point to the elaborate provisions in section 636(c) for the conduct of civil trials (including jury trials) by a magistrate *with the consent of both parties* if a district judge could compel the parties, against their wishes, to submit to a magistrate's conducting vital stages in the trial, such as the voir dire of the jury."). To the contrary, the legislative history explains, in the paragraph preceding the "experiment" reference:

> This subsection would permit, for example, a magistrate to review default judgments, order the exoneration or forfeiture of bonds in criminal cases, and accept returns of jury verdicts where the trial judge is unavailable. This subsection would also enable the court to delegate some of the more administrative functions to a magistrate, such as the appointment of attorneys in criminal cases and assistance in the preparation of plans to achieve prompt disposition of cases in the court.

H.R. REP. NO. 94-1609 at 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6172. Reviewing default judgments and conducting "administrative" duties bear no resemblance to appropriating key portions of a trial on damages. *See Banks v. United States*, 614 F.2d 95, 97 (6th Cir. 1980) ("[T]he legislative history suggests that this [additional duties]

provision was meant to apply only to procedural and administrative matters."). In a similar vein, *Peretz* spoke approvingly of the "experiment" so long as it was "acceptable to all participants in the trial process and [] consistent with the basic purposes of the statute." *Peretz*, 501 U.S. at 933.

Yet in Petitioner's eyes, the "additional duties" clause knows no bounds but the Constitution. Not surprisingly, however, it presents no cases that have shunned the contextual statutory approach mandated by this Court.

3. This case also presents a poor vehicle for review based on its underlying context. The Third Circuit devoted substantial attention to the narrow issue of the role of equitable allocation in CERCLA contribution actions. Petitioner's criticism of the court's conclusions in this regard reveals the fact-dependent nature of this case. Although CERCLA litigation abounds, the lack of disputes over magistrate references in this context confirms that this case will not have a wide-reaching impact. A detailed analysis by this Court of the role of equitable allocation proceedings in CERCLA actions will thus offer no meaningful guidance to the lower courts.

4. In addition to the reasons chronicled above, review in this case would be of limited utility since the Third Circuit has already held that the case must be remanded regardless of the propriety of the magistrate reference. In light of the length of this litigation, after reversing based on the magistrate question, the Third Circuit provided further guidance to the litigants, explaining that the district court committed a fundamental error in its cost allocation decision because it applied the wrong legal standard. (Pet. App. 34a). Needless to say, the factual "findings" reviewed and applied by the district court were influenced by the improper legal conclusion. Thus, even if Petitioner succeeded in obtaining review and a reversal from this Court, its victory would largely be a pyrrhic one. The matter would still have to be returned to the district court and the record reopened.

Proceeding in such a fashion would be a tremendous waste of this Court's resources.

5. The points about the reversal of the district court's decision reveal the futility in Petitioner's harmless error argument. (Pet. at 28-29). First, Petitioner advances no authority to contradict the Third Circuit's conclusion that "[s]ince the Magistrate Judge lacked the power to conduct the equitable allocation proceeding in this case, there was nothing for the District Court to review." (Pet. App. 32a). And indeed, the only extant authority supports this proposition. *United States v. Ruiz-Rodriguez*, 277 F.3d 1281, 1293 n.17 (11th Cir. 2002) ("Harmless error analysis does not apply when a magistrate judge lacks the power to act."); *Thomas v. Whitworth*, 136 F.3d 756, 761 (11th Cir. 1998) ("[I]t can never be genuinely 'harmless' for a litigant, over his objection, to be compelled to try some or all [of] his case before a non-Article III judicial officer not entitled to exercise the power of an Article III judge."); *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1369 (7th Cir. 1990) ("[I]ssues of entitlement to a particular kind of tribunal are in general not subject to the harmless error rule. . . ."); *United States v. Colacurcio*, 84 F.3d 326, 333 (9th Cir. 1996) (recognizing that lack of magistrate authority could not be cured by district court review and remanding for new proceeding before district court).

The Seventh Circuit refused to find harmless error even though the party objecting to the magistrate's delegation "made no effort to show how it was harmed." *Olympia*, 908 F.2d at 1369. In most cases, the "demonstration of harm" by an improper delegation will be "impossible" for the party to establish. *Id.* at 1370. In this case, by contrast, the Third Circuit has already substantiated the harm claim. The district court adopted the magistrate's findings and conclusions virtually whole-scale, and the Third Circuit explained that these findings were tainted by proceeding under an improper analytical method. Therefore, regardless of the magistrate's

diligence, its actions cannot be described as "harmless" to Mead.

As explained above, the Third Circuit's decision sits comfortably alongside authority from its sister circuits and demonstrates fidelity to this Court's precedent. The district court delegated an indispensable part of a CERCLA trial to the magistrate judge, obligating the magistrate to embark on a 12 day hearing, replete with approximately 1300 exhibits and the testimony of 14 witnesses. Such an undertaking demanded fact-finding and credibility assessment, rather than the "procedural," "administrative," or "subsidiary" tasks that have been found properly delegated under the additional duties clause when consent was wanting.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 23, 2005

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No. 05-524

FILED
DEC 5 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the
Supreme Court of the United States

BEAZER EAST, INC.,

Petitioner,

v.

THE MEAD CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY BRIEF

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DECEMBER 5, 2005

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INTRODUCTION

Mead claims that there are three reasons why this Court should deny certiorari: (1) there is no circuit split; (2) the Third Circuit's Opinion does not conflict with Supreme Court precedent; and (3) this case is not a proper vehicle for certiorari. For the reasons set forth below, Mead's arguments are not persuasive.

REASONS FOR GRANTING THE PETITION

I. The Decision of the Third Circuit Directly Conflicts With the Tenth Circuit.

Despite Mead's claim that Beazer has "manufactured" a circuit split, a review of Mead's response fails to explain how the Tenth Circuit's decision in *Clark v. Poulton*, 963 F.2d 1361 (10th Cir.), *cert. denied*, 419 U.S. 1014 (1992), can be reconciled with the Third Circuit's decision in this case.[1] The key point in *Clark* is clear: "the majority's reading of section 636(b)(3) would permit a district court to refer to a magistrate the entire civil trial of any plaintiff, without consent, so long as the district court retained *de novo* review as specified by section 636(b)(1)(C)." *Id.* at 1369 (Seymour, J., dissenting); *see also id.* at 1365-66 (majority opinion, articulating reasons for broad interpretation of subsection (b)(3)). This result clearly conflicts with the Third Circuit.

Furthermore, the cases Mead relies upon do not stand for a universal proposition that CERCLA equitable allocation hearings must be conducted by an Article III judge. *Gopher Oil Co. v. Union Oil Co.*, 955 F.2d 519, 526 (8th Cir. 1992),

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[1] Beazer's decision not to rely on *Clark* before the Third Circuit does not "speak[] volumes" about whether there is a circuit split. Opp. at 9. Instead, Beazer simply acknowledged that the Third Circuit is not bound by a Tenth Circuit decision. *See, e.g.*, 3rd Cir. LAR 28.3(b) (2002). In contrast, this Court is concerned with precisely the type of conflict created by this circuit split.

merely noted that in CERCLA allocations the findings are made by the court, not the jury. *Banks v. United States*, 614 F.2d 95, 98 (6th Cir. 1980), held that *credibility* determinations must be made by the district judge. In the instant case, the District Court's referral order reserved the right to rehear evidence. App. 237a. However, the District Court determined, as part of its twenty-page *de novo* review, that this was not necessary:

> The review and assessment of the testimony in this manner and the expressed merit-based reasons for adopting certain portions of the witnesses' testimony and opinions also renders moot Mead's objection that the allocation hearing/report and recommendation transcends the boundaries of the Magistrates Act. It similarly reveals the lack of merit in Mead's insistence that a trial de novo with live witness presentations be conducted before this court on the same issues presented to the Magistrate Judge in order for the court to judge for itself the credibility of witnesses. The report assigns relative weight on such factors as the methodology employed, the thoroughness of the expert's analysis, the number of potential relevant factors considered, the internal consistency of the testimony and assessments made, and so forth. It does not discredit any testimony on the basis of the demeanor or character of the witness.

App. 124a n.5. Therefore, unlike *Gopher Oil*, a case involving allegations of fraud, which clearly calls for credibility determinations, and *Banks*, a probation revocation hearing focused on "credibility assessment," this case involved the comparison of expert witnesses presenting two very different analytical approaches to equitable allocation, and limited factual determinations based almost exclusively on a paper record.

II. The Third Circuit's Decision Conflicts With This Court's Reasoning as Stated in Its Magistrates Act Decisions.

Beazer's Petition did not, as Mead claims, assert that the Third Circuit's decision conflicts with holdings from this Court. To the contrary, Beazer consistently acknowledged that this Court has never addressed the precise issue presented by this case, Pet. at 21, which is one of the many reasons why this Court should grant this Petition. Instead, Beazer's Petition describes the ways in which the Third Circuit's decision conflicts with fundamental principles that this Court has applied in its Magistrates Act analysis. Pet. at 21–29.

Mead's discussion of *Peretz v. United States*, 501 U.S. 923 (1991), and *Gomez v. United States*, 490 U.S. 858 (1989), ignores the fact that, unlike the present case, constitutional concerns regarding the right to a trial by jury were readily apparent. Even more significantly, Mead fails to discuss adequately the rationale in *Mathews v. Weber*, 423 U.S. 261 (1976) (identifying due process advantages of referral to magistrate), this Court's leading case regarding civil assignments to magistrates. Instead, Mead attempts to dismiss the applicability of the *Mathews* rationale in a footnote, by making meaningless distinctions that this case involved (1) "a prior version of the Federal Magistrates Act" and (2) a "closed administrative record." Opp. at 10 n.4. First, the differences between the version of the Magistrates Act at issue in *Mathews* and the current version of the Act favor the referral. Pet. at 14-18 (discussing the history of the Act). Second, the fact that the record was closed in *Mathews* is of no import. For purposes of analyzing the Magistrates Act, the key point is whether the magistrate relied upon credibility determinations that could not be meaningfully reviewed by the district court during its *de novo* review. As noted above, the Magistrate in the instant case did not rely on

any credibility determinations in making his proposed findings. Therefore, the status of the record is a distinction without a difference, and this Court's analysis in *Mathews* cannot be reconciled with the Third Circuit's approach. Pet. at 26–28.

Finally Mead's quote from *Mathews*, noting that the magistrate in that case "may do no more than propose a recommendation," is an important concession – this is precisely the limitation imposed on the Magistrate in the instant case. This is the type of limitation that this Court found persuasive in *Mathews*, and is one reason why the Third Circuit erred in overturning the assignment in this case.

III. This Case is the Ideal Vehicle for This Court to Review the Scope of a Magistrate's Authority to Conduct Nonjury Hearings in Civil Cases.

1. Mead contends that the Third Circuit "never reached" any Constitutional questions regarding subsection (b)(3), and instead issued a ruling solely on "statutory grounds." Opp. at 12-13. Given that the text of this section provides: "A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States," 28 U.S.C. § 636(b)(3) (2005), any attempt to limit an analysis of this section to "statutory interpretation" ignores the fact that Congress has made the Constitution an express part of that analysis.

While the Third Circuit seized on this Court's analysis of the Magistrates Act in criminal cases such as *Peretz* and *Gomez*, the Constitutional issue in these cases is so readily apparent (the right to criminal trial by jury) that an in-depth Constitutional analysis was not necessary. Where Constitutional concerns are present, this Court has suggested that the duties assignable to magistrates should resemble those duties that are specifically enumerated in other sections of the Magistrates Act. This Court's discussion in *Mathews*,

however, indicates that where no such Constitutional concerns are present, there is no need for the assigned duties to closely resemble the enumerated duties, as long as the district court conducts a *de novo* review. As in *Mathews*, with civil nonjury hearings, such as the hearing in this case, it is the absence of Constitutional concerns that provides wide latitude for district courts to assign these hearings to magistrates.

2. Mead claims that the Third Circuit decision will not have a "chilling effect" on the Congressional intent to permit district courts to "experiment" with the use of magistrates pursuant to subsection (b)(3), because, according to Mead, Beazer's Petition overstates the level of experimentation that Congress intended. Opp. at 13-14. Placed in context, however, the legislative history supports Beazer's position. Specifically, the House Report proposing the addition of subsection (b)(3) reads as follows:

> Proposed subsection 636(b)(3) provides for the assignment to a magistrate of **any other duty not inconsistent with the Constitution and laws of the United States**. A similar provision is contained in the existing legislation. This subsection enables the district courts to continue innovative experimentations in the use of this judicial officer. **At the same time, placing this authorization in an entirely separate subsection emphasizes that it is not restricted in any way by any other specific grant of authority to magistrates.**
>
> Under this subsection district courts would remain free to experiment in the assignment of other duties to magistrates **which may not necessarily be included in the broad category of "pretrial matters."** This subsection would permit, **for example**, a magistrate to review default judgments, order the exoneration or forfeiture of bonds in criminal cases, and accept

> returns of jury verdicts where the trial judge is unavailable. This subsection would also enable the court to delegate some of the more administrative functions to a magistrate such as the appointment of attorneys in criminal cases and assistance in the preparation of plans to achieve prompt disposition of cases in the court.

H.R. Rep. No. 94-1609 at 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6172 (emphasis added).[2] It is readily apparent from the foregoing paragraph that, by isolating the "additional duties" clause from the prescribed duties contained in subsections (b)(1) and (b)(2), Congress intended to prevent those enumerated duties from becoming an unreasonable restraint on district courts' experimentation.[3]

Furthermore, Mead's quote from *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1369 (7th Cir. 1990), Opp. at 14, indicates a decision to ignore completely

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[2] Furthermore, the Third Circuit erred by concluding that subsection (b)(3) is only appropriately used to assign "preliminary" matters to a magistrate. App. 31a. Section 636(b)(1) explicitly permits a district court to assign "any pretrial matter" (with limited exceptions) to a magistrate. Therefore, limiting the interpretation of subsection (b)(3) to "preliminary" matters renders the section superfluous, in clear violation of the "rule against superfluities." *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

[3] The Seventh Circuit addressed this distinction in *In re Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d 1335, 1340–41 (7th Cir. 1979) (holding that magistrates are authorized to issue OSHA search warrants, reasoning that the "additional duties" in subsection (b)(3) "are not to be restricted to only specific statutory grants of authority or limited to functions delineated in section 636(b), for example, duties only related to 'any pretrial matter.' The only limitations on section 636(b)(3) are that the duties be consistent with the Constitution and federal laws and that they not be specifically excluded by section 636(b)(1).").

a key point in Beazer's Petition – namely, that the continued oversight and participation of the district court is the key distinction between non-consensual referrals under § 636(b) (requiring *de novo* review by an Article III judge) and consensual referrals under § 636(c) (providing no further recourse to an Article III judge). Pet. at 19–21. In addition, this Court has previously recognized the broader scope of delegation to magistrates that is permitted when the district court retains *de novo* review. *Mathews v. Weber*, 423 U.S. at 270-72.[4]

3. Mead contends that this case is not worthy of review by this Court because the issues are limited to CERCLA cases. To the contrary, the scope of section 636(b)(3) assignments is an issue present in all nonjury civil cases.[5]

4. Mead is wrong to suggest that the case must be remanded in any event. The fundamental flaw in the Third

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[4] In its 1976 amendments to the Magistrates Act, Congress fully considered this critical distinction surrounding the scope of the district court's review. "The amendment states expressly ... that the district judge in making the ultimate determination of the matter, would have to give fresh consideration to those issues to which specific objections have been made by a party." H.R. Rep. No. 94-1609 at 3, *reprinted in* 1976 U.S.C.C.A.N. at 6163. In developing the procedure for the district court on review, Congress adopted the approach outlined in *Campbell v. United States Dist. Court for the N. Dist. of Cal.*, 501 F.2d 196 (9th Cir. 1974), *cert. denied*, 419 U.S. 879 (1974). Under the procedure adopted in *Campbell*, as codified by the 1976 amendments to the Act, while the district court "may call for and receive additional evidence ... it is not required to hear any witness and not required to hold a de novo hearing of the case." *Id.* at 207-08; *accord* H.R. Rep. No. 94-1609 at 3-4.

[5] Beazer's discussion of the statistics regarding the use of magistrates highlights for this Court the wide application that this issue has on jurisprudence throughout the country.

Circuit's opinion is that it fails to recognize the District Court's total control and direction of the Magistrate's work and the importance of the District Court's *de novo* review. This fundamental error infects the Third Circuit's analysis of both the initial referral and the District Court's actual allocation. Thus, both parts of the Third Circuit's opinion should be stricken.

The Court of Appeals states that the District Court "somewhat ambiguously adopted" rationales set forth by the Magistrate, App. 35a, without analyzing what the District Court actually said. App. 111a-130a.[6] Thus, the Third Circuit attributes findings and conclusions made by the Magistrate to the District Court, without giving proper consideration to the actual *de novo* review performed by the District Court. *See Mathews,* 423 U.S. at 274 ("We categorically reject the suggestion that judges will accept, uncritically, recommendations of magistrates.").

5. The Third Circuit characterized the referral to the Magistrate as "jurisdictional" and concluded that such an

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[6] In particular, the Third Circuit concluded that the District Court felt compelled to restrain its equitable discretion due to the "polluter pays" policy. App. 40a-41a. To the contrary, the District Court clearly explained that it was giving full equitable consideration to the "purchase agreement factors" and did not feel constrained by the "polluter pays" policy. *See* App. 122a ("As modified the above allocation strikes an appropriate equitable balance between the factors surrounding the 1974 sale of the site to Beazer, Beazer and KII's ownership and ongoing operation of the site since 1974, the factors pertaining to each party's contributions to the current condition of the site, and the remaining equitable factors, identified in the report."); App. 116a ("Although the 'polluter pays' policy is an important guide post in analyzing CERCLA matters, § 9613(f) assigns to the court the obligation of determining in any particular case the appropriate equitable factors to be considered in the allocation process.").